



U.S. Department of Justice

Environment and Natural Resources Division

236380-4-1-19-04996

*Law and Policy Section
P.O. Box 7415
Ben Franklin Station
Washington, DC 20044-7415*

*Telephone (202) 514-0424
Facsimile (202) 514-4231*

VIA EMAIL

Austin R. Evers
Hart Wood
American Oversight
1030 15th Street, NW
Suite B255
Washington, DC 20005
(202) 873-1743
foia@americanoversight.org

APR 04 2019

FOIA No.: 2019-04996

Dear Messrs. Evers and Wood:

This letter responds to your Freedom of Information Act (FOIA) request seeking the following:

1. All email communications from January 21, 2017, through November 25, 2017, (including email messages, attachments, calendar entries, or calendar invitations) sent or received by Brandon Middleton that include the terms "Endangered Species Act," "ESA," "Clean Power Plan," or "CPP."
2. All email communications from January 21, 2017, through November 25, 2017, (including email messages, attachments, calendar entries, or calendar invitations) between Brandon Middleton (and anyone acting on his behalf) and any person representing: a. Pacific Legal Foundation (@pacificlegal.org); b. Drummond Coal (@drummondco.com); c. Balch & Bingham LLP (@balch.com); d. Harrison, Temblador, Hungerford & Johnson LLP (@hthjlaw.com); e. American Enterprise Institute (@aei.org); f. Americans for Prosperity (@americansforprosperity.org); g. American Legislative Exchange Council (@alec.org); h. Beacon Hill Institute (@beaconhill.org); i. British Petroleum (@bp.com); j. Caelus Energy (@caelusenergy.com); k. Cato Institute (@cato.org); l. Committee for a Constructive Tomorrow (@cfact.org); m. Koch Industries (@kochind.com); n. Competitive Enterprise Institute (@cei.org); o. Energy and Environmental Legal Institute (@eelegal.org); p. The Heartland Institute (@heartland.org); q. Heritage Foundation (@heritage.org); r. Institute for Energy

Research (@instituteforenergyresearch.org); s. Manhattan Institute for Policy Research (@manhattan-institute.org).

The Environment and Natural Resources Division (ENRD) received your FOIA request on February 6, 2019. On February 19, 2018, ENRD FOIA Coordinator Charles Smiroldo emailed an acknowledgment letter informing you that due to unusual circumstance we would not be able to process your request within 20 business days. Mr. Wood had several conversations with Peter McVeigh of the Law and Policy Section, including one on February 22, 2019. As confirmed by email on March 19, 2019, Mr. Wood agreed to narrow the scope of the request by excluding (1) email attachments that are not themselves responsive to the request, with the caveat that they may be requested in the future; (2) regarding part 1 of the request, internal email exchanged within the Department of Justice; and (3) also regarding part 1, email communications sent directly to Brandon Middleton as a result of his subscription to a news service, unless it is part of an email chain that contains comments on the article.

Please find attached a PDF containing 17 pages responsive to your request. We redacted some of the information contained in these pages pursuant to Exemptions 4 and/or 6 of the FOIA. Exemption 4 relates to documents that may contain “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.” 5 U.S.C. § 552(b)(4). Exemption 6 relates to information about individuals in “personnel and medical files and similar files” where the disclosure of such information would “constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6).

We are withholding in full 69 documents pursuant to Exemption 5 of the FOIA, which relates to “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” The content of these records is protected by the attorney-client privilege, the attorney work-product doctrine, and/or the deliberative process privilege. 5 U.S.C. § 552(b)(5).

There are no fees associated with the processing of your FOIA request.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. 552(c) (2006 & Supp. IV 2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

If you are not satisfied with my response to this request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001, or you may submit an appeal through OIP’s FOIA online portal by creating an account on the following web site: <https://foiaonline.regulations.gov/foia/action/public/home>. Your appeal must be postmarked or electronically transmitted within 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked “Freedom of Information Act Appeal.”

If you need any further assistance, please contact Peter McVeigh at (202) 514-4642 or our FOIA Public Liaison Amber Blaha at (202) 616-5515. Additionally, you may contact the

Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services it offers. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at (202) 741-5770; toll free at 1 (877) 684-6448; or facsimile at (202) 741-5769.

Sincerely,



Karen M. Wardzinski
Chief, Law & Policy Section

From: Rachel Ayerst Manfredi <RAyerst@aei.org>
To: Middleton, Brandon (ENRD)
Sent: 9/11/2018 10:51:38 AM
Subject: Exclusive AEI Invitation



Dear Mr. Middleton,

Based on your work in the state legislature, I want to invite you to join our exclusive event for leaders across the country. This is a tremendous opportunity to hear from the nation's top policy experts, your fellow legislators, and non-profit and public sector leaders. Other state legislators from throughout the country have also been invited to attend our leadership development summit. This event will be held in Chicago, Illinois, from October 17–19, 2018. This summit is a part of AEI's Leadership Network programming and is designed for leaders from across the country representing the worlds of state and local policy, law, business, community organizations, and non-profits. The program will encompass a series of bipartisan policy discussions and presentations from some of AEI's best scholars, including: AEI President Arthur Brooks on the art of persuasion; Jonah Goldberg on *Suicide of the West*, his 2018 *New York Times* bestseller; and Robert Doar on social welfare program reform. By attending this event, you will become a part of AEI's regional network of leaders. You can review the complete agenda [here](#).

What: AEI Leadership Network Midwest Regional Summit. See agenda [here](#) and the marketing brochure [here](#).

Where: Marriott Marquis—2121 South Prairie Avenue, Chicago, Illinois 60616

When: October 17–19, 2018. The event begins in the late afternoon on October 17 and concludes mid-morning on October 19. Please register by September 15 to guarantee a spot.

Who: The most talented leaders in state and local government, business, non-profit, and community organizations from throughout the country.

Why: We will provide policy and leadership training focused on increasing individual opportunity in our country. We will examine this issue through the lens of poverty alleviation, education, and free enterprise.

How: Register by clicking the button below. The registration fee for the event (which covers all of your meals and materials) is \$149. The registration fee includes all five conference meals, two networking receptions, and several books. The room rate at the Marriott Marquis is \$220. If participation costs are an issue for you, AEI has some funds available to assist you. You can learn more about how to request a stipend at [this link](#).

REGISTER

If you have any additional questions, feel free to reach out to the AEI team at AEICoalitions@aei.org.

Best wishes,
Rachel

Rachel Ayerst Manfredi
Managing Director, Development and Strategic Initiatives
American Enterprise Institute
1789 Massachusetts Avenue, NW
Washington, DC 20036
202.862.7187 (office)
[REDACTED] (cell)

Ex. 6



From: Tony Francois <TFrancois@pacificlegal.org>
To: Middleton, Brandon (ENRD)
Sent: 11/15/2017 12:52:43 PM
Subject: Re: Federalist Society Meeting

Sounds good, you too Brandon.

Tony

Sent from my MetroPCS 4G Android device

----- Original message-----

From: Middleton, Brandon (ENRD)

Date: Wed, Nov 15, 2017 11:51 AM

To: Tony Francois;

Subject: RE: Federalist Society Meeting

Hey Tony,

This week is not good for me, unfortunately, but thanks for reaching out and hopefully we may be able to get together next time you're in town. Have a great Thanksgiving!

Brandon

From: Tony Francois [mailto:TFrancois@pacificlegal.org]
Sent: Tuesday, November 14, 2017 5:21 PM
To: Middleton, Brandon (ENRD) <BMiddleton@ENRD.USDOJ.GOV>
Subject: Federalist Society Meeting

Hi Brandon,

I don't know if you are going to be attending any of the Federalist Society meeting this week, but I will be in town and thought I would offer to buy you a drink if you are around.

Best,

Tony Francois | Senior Attorney
Pacific Legal Foundation
930 G Street | Sacramento, CA 95814
916.419.7111

[Pacific Legal Foundation]<<http://www.pacificlegal.org/>>

From: Reed Hopper <RHopper@pacificlegal.org>
To: Middleton, Brandon (ENRD)
Sent: 11/10/2017 2:03:26 PM
Subject: RE: Markle Interests v. USFWS

FYI

<https://pacificlegal.org/government-extremism-is-no-virtue/>

From: Middleton, Brandon (ENRD) [mailto:Brandon.Middleton@usdoj.gov]
Sent: Wednesday, July 26, 2017 2:22 PM
To: Reed Hopper <RHopper@pacificlegal.org>
Cc: Wardzinski, Karen (ENRD) <Karen.Wardzinski@usdoj.gov>
Subject: RE: Markle Interests v. USFWS

Thanks Reed.

From: Reed Hopper [mailto:RHopper@pacificlegal.org]
Sent: Wednesday, July 26, 2017 5:45 PM
To: Middleton, Brandon (ENRD) <BMiddleton@ENRD.USDOJ.GOV>
Cc: Wardzinski, Karen (ENRD) <KWardzinsk@ENRD.USDOJ.GOV>
Subject: RE: Markle Interests v. USFWS

Brandon, I don't believe you did any substantive work on the case. I handled all aspects of the case myself.

I hope this helps,

Reed

From: Middleton, Brandon (ENRD) [mailto:Brandon.Middleton@usdoj.gov]
Sent: Wednesday, July 26, 2017 2:16 PM
To: Reed Hopper <RHopper@pacificlegal.org>
Cc: Wardzinski, Karen (ENRD) <Karen.Wardzinski@usdoj.gov>
Subject: Markle Interests v. USFWS

Hi Reed,

I hope this email finds you well. We are in the process of evaluating my ability to work on the Markle litigation and confirming that my prior work at PLF presents no recusal issues for this matter. My recollection is that during my time at PLF [redacted]

Ex. 4

Ex. 4

Can you whether this recollection is correct, and whether I did any substantive work for this case? I have cc'd Karen Wardzinski, the designated ENRD ethics official, on this email.

Thank you very much.

Brandon

CONFIDENTIALITY NOTICE: This communication and any accompanying document(s) are confidential and privileged. They are intended for the sole use of the addressee. If you receive this transmission in error, you are advised that any disclosure, copying, distribution, or the taking of any action in reliance upon the communication is strictly prohibited. Moreover, any such inadvertent disclosure shall not compromise or be a waiver of any applicable privilege as to this communication or otherwise. If you have received this communication in error, please contact the sender at its Internet address above, or by telephone at (425) 576-0484. Thank you.

Not Responsive

From: Beard, Paul [mailto:Paul.Beard@alston.com]

Sent: Tuesday, November 07, 2017 4:35 PM

To: Middleton, Brandon (ENRD) <BMiddleton@ENRD.USDOJ.GOV>

Subject: Golden Queen

Hey Brandon – Attached are (1) the settlement agreement re: the service's requirement to make decisions on a number of proposed species (including the Mojave shoulderband snail), and (2) a June motion to modify the deadline for the snail (so that a listing decision is now due Nov. 30. Note that the current DOJ on this case is:

Clifford Eugene Stevens , Jr.

U.S. DEPARTMENT OF JUSTICE

P.O. Box 7611

Washington, DC 20044

(202) 353-7548

Fax: (202) 305-0275

Email: clifford.stevens@usdoj.gov

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Paul J. Beard II | ALSTON & BIRD LLP

1115 11th Street, Sacramento CA 95814

Office: 916-498-3354 | Mobile: 818-216-3988

paul.beard@alston.com | <http://www.alston.com/professionals/paul-beard/>

Atlanta | Beijing | Brussels | Charlotte | Dallas | Los Angeles | New York | Research Triangle | Sacramento | San Francisco | Silicon Valley | Washington DC

NOTICE: This e-mail message and all attachments may contain legally privileged and confidential information intended solely for the use of the addressee. If you are not the intended recipient, you are hereby notified that you may not read, copy, distribute or otherwise use this message or its attachments. If you have received this message in error, please notify the sender by email and delete all copies of the message immediately.

From: Jim Burling <jsb@pacificlegal.org>
To: Grant, Eric (ENRD)
CC: Middleton, Brandon (ENRD)
Sent: 5/17/2017 12:30:07 PM
Subject: RE: Call this afternoon?

Can we push that back to 2:30? I have a 1 to 2 p.m. appointment in the Arden area.

-----Original Message-----

From: Grant, Eric (ENRD) [mailto:Eric.Grant@usdoj.gov]
Sent: Wednesday, May 17, 2017 9:29 AM
To: Jim Burling <jsb@pacificlegal.org>
Cc: Middleton, Brandon (ENRD) <Brandon.Middleton@usdoj.gov>
Subject: Call this afternoon?

Hi Jim,

Are you available to talk with Brandon Middleton and me this afternoon at 2:00 p.m. Pacific?

Thanks,
Eric Grant
Deputy Assistant Attorney General
Environment and Natural Resources Division

CONFIDENTIALITY NOTICE: This communication and any accompanying document(s) are confidential and privileged. They are intended for the sole use of the addressee. If you receive this transmission in error, you are advised that any disclosure, copying, distribution, or the taking of any action in reliance upon the communication is strictly prohibited. Moreover, any such inadvertent disclosure shall not compromise or be a waiver of any applicable privilege as to this communication or otherwise. If you have received this communication in error, please contact the sender at its Internet address above, or by telephone at (561) 691-5000. Thank you.

From: Reed Hopper <RHopper@pacificlegal.org>
To: Middleton, Brandon (ENRD)
Sent: 5/9/2017 4:24:17 PM
Subject: RE: This afternoon

Thanks

From: Middleton, Brandon (ENRD) [mailto:Brandon.Middleton@usdoj.gov]

Sent: Tuesday, May 9, 2017 1:15 PM

To: Reed Hopper <RHopper@pacificlegal.org>

Subject: RE: This afternoon

Thanks for the heads up. In case I forget, have a great trip.

From: Reed Hopper [mailto:RHopper@pacificlegal.org]

Sent: Tuesday, May 09, 2017 4:13 PM

To: Middleton, Brandon (ENRD) <BMiddleton@ENRD.USDOJ.GOV>

Subject: RE: This afternoon

Ok. No problem. Just FYI. I will be leaving for [REDACTED]

Ex. 6

From: Middleton, Brandon (ENRD) [mailto:Brandon.Middleton@usdoj.gov]

Sent: Tuesday, May 9, 2017 1:03 PM

To: Reed Hopper <RHopper@pacificlegal.org>

Subject: This afternoon

Reed,

We've got another meeting now which conflicts with our call, so I will have to postpone for now. My apologies in advance.

Brandon

CONFIDENTIALITY NOTICE: This communication and any accompanying document(s) are confidential and privileged. They are intended for the sole use of the addressee. If you receive this transmission in error, you are advised that any disclosure, copying, distribution, or the taking of any action in reliance upon the communication is strictly prohibited. Moreover, any such inadvertent disclosure shall not compromise or be a waiver of any applicable privilege as to this communication or otherwise. If you have received this communication in error, please contact the sender at its Internet address above, or by telephone at (425) 576-0484. Thank you.

From: Reed Hopper <RHopper@pacificlegal.org>
To: Middleton, Brandon (ENRD)
Sent: 4/5/2017 11:41:12 AM
Subject: Alabama v. NMFS
Attachments: Unopposed MOTION to Stay-c.pdf

Brandon, today the court granted the stay in this challenge to the critical habitat regs thru June 12 to allow the Administration to decide how it will proceed in the case. The case has ramifications for *Markle v. USFWS*. Cert due June 29. <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/16a916.htm>

CONFIDENTIALITY NOTICE: This communication and any accompanying document(s) are confidential and privileged. They are intended for the sole use of the addressee. If you receive this transmission in error, you are advised that any disclosure, copying, distribution, or the taking of any action in reliance upon the communication is strictly prohibited. Moreover, any such inadvertent disclosure shall not compromise or be a waiver of any applicable privilege as to this communication or otherwise. If you have received this communication in error, please contact the sender at its Internet address above, or by telephone at (425) 576-0484. Thank you.

From: Jonathan Wood <jw@pacificlegal.org>
To: Middleton, Brandon (ENRD)
Sent: 4/4/2017 11:25:40 AM
Subject: Quick question

Hey Brandon,

Do you know whether ENRD has assigned the attorneys for *Mass. Lobstermen's Association v. Ross*, D.D.C. No. 17-cv-00406?

The government's response isn't due for a while, but NRDC, CLF, CBD, etc. have moved to intervene in the case. The briefing window for that motion will close before the federal defendants are due to make an appearance. I was thinking about stating in my response that the court should wait to rule and give the government an opportunity to weigh in on the intervention motion. Depending on how the administration intends to respond to the suit, the intervenors could complicate things for it too.

Thanks!

Jonathan Wood

Attorney

Pacific Legal Foundation

3033 Wilson Blvd.

Arlington, VA 22201

(202) 888-6881

[Articles on SSRN](#)

[Blog](#)

CONFIDENTIALITY NOTICE: This communication and any accompanying document(s) are confidential and privileged. They are intended for the sole use of the addressee. If you receive this transmission in error, you are advised that any disclosure, copying, distribution, or the taking of any action in reliance upon the communication is strictly prohibited. Moreover, any such inadvertent disclosure shall not compromise or be a waiver of any applicable privilege as to this communication or otherwise. If you have received this communication in error, please contact the sender at its Internet address above, or by telephone at (916) 419-7111. Thank you.

From: Reed Hopper <RHopper@pacificlegal.org>
To: Middleton, Brandon (ENRD)
Sent: 3/29/2017 4:11:36 PM
Subject:

Hi Brandon, can we talk about the Markle gopher frog case?

Reed

CONFIDENTIALITY NOTICE: This communication and any accompanying document(s) are confidential and privileged. They are intended for the sole use of the addressee. If you receive this transmission in error, you are advised that any disclosure, copying, distribution, or the taking of any action in reliance upon the communication is strictly prohibited. Moreover, any such inadvertent disclosure shall not compromise or be a waiver of any applicable privilege as to this communication or otherwise. If you have received this communication in error, please contact the sender at its Internet address above, or by telephone at (425) 576-0484. Thank you.

From: [REDACTED] **Exemption 6**
To: Middleton, Brandon (ENRD)
Sent: 3/29/2017 1:36:04 PM
Subject: Fwd: FWS staff question

----- Forwarded message -----

From: **Jonathan Wood** <jw@pacificlegal.org>
Date: Fri, Mar 24, 2017 at 5:36 PM
Subject: FWS staff question

To: [REDACTED]

Exemption 6

Brandon,

I hope you're settling in well at ENRD. I have a quick question for you: do you know who your counterpart is at FWS, while we wait for a Director nomination?

Last year, PLF submitted a pair of petitions to repeal the take regulation for threatened species and have never heard anything. It would be nice to know that issue is on the administration's radar.

Have a great weekend!

Jonathan Wood

Attorney

Pacific Legal Foundation

3033 Wilson Blvd.

Arlington, VA 22201

(202) 888-6881

CONFIDENTIALITY NOTICE: This communication and any accompanying document(s) are confidential and privileged. They are intended for the sole use of the addressee. If you receive this transmission in error, you are advised that any disclosure, copying, distribution, or the taking of any action in reliance upon the communication is strictly prohibited. Moreover, any such inadvertent disclosure shall not compromise or be a waiver of any applicable privilege as to this communication or otherwise. If you have received this communication in error, please contact the sender at its Internet address above, or by telephone at (916) 419-7111. Thank you.

From: Exemption 6
To: Middleton, Brandon (ENRD)
Sent: 3/29/2017 1:34:50 PM
Subject: Fwd: Duarte Nursery v. Corps of Engineers
Attachments: pdf.pdf

----- Forwarded message -----

From: **Anthony L. Francois** <TFrancois@pacificlegal.org>
Date: Fri, Mar 24, 2017 at 2:34 PM
Subject: Duarte Nursery v. Corps of Engineers

To: Exemption 6

Hello Brandon,

Please let me know if you are in a position to discuss this PLF case. It did not arise during your tenure here. Also, please let me know how best to contact you directly at work. I am attaching an order issued today by the District Court for background. I am available for a phone call and am interested in speaking with you if you are able to discuss the case.

I hope you are doing well and enjoying things there in DC.

Tony Francois

Senior Attorney

Pacific Legal Foundation

930 G Street

Sacramento, CA 95814

(916) 419-7111

alf@pacificlegal.org

www.pacificlegal.org

CONFIDENTIALITY NOTICE: This communication and any accompanying document(s) are confidential and privileged. They are intended for the sole use of the addressee. If you receive this transmission in error, you are advised that any disclosure, copying, distribution, or the taking of any action in reliance upon the communication is strictly prohibited. Moreover, any such inadvertent disclosure shall not compromise or be a waiver of any applicable privilege as to this communication or otherwise. If you have received this communication in error, please contact the sender at its Internet address above, or by telephone at (916) 419-7111. Thank you.

From: Tawnda Elling <tae@pacificlegal.org>
To: Middleton, Brandon (ENRD)
Sent: 3/29/2017 11:55:11 AM
Subject: RE: Sage grouse

That's funny that you remember the file number!

From: Middleton, Brandon (ENRD) [mailto:Brandon.Middleton@usdoj.gov]
Sent: Wednesday, March 29, 2017 8:54 AM
To: Tawnda Elling <tae@pacificlegal.org>
Subject: RE: Sage grouse

ty

From: Tawnda Elling [mailto:tae@pacificlegal.org]
Sent: Wednesday, March 29, 2017 11:52 AM
To: Middleton, Brandon (ENRD) <BMiddleton@ENRD.USDOJ.GOV>
Subject: RE: Sage grouse

Western Watersheds Project v. USFWS, D. Idaho No. 4:10-cv-00229-BLW

From: Middleton, Brandon (ENRD) [mailto:Brandon.Middleton@usdoj.gov]
Sent: Wednesday, March 29, 2017 7:36 AM
To: Tawnda Elling <tae@pacificlegal.org>
Subject: Sage grouse

Can you remind me what the docket was for the sage grouse case I worked on in D. Idaho? Believe LF # was

Ex. 4
Thanks.

CONFIDENTIALITY NOTICE: This communication and any accompanying document(s) are confidential and privileged. They are intended for the sole use of the addressee. If you receive this transmission in error, you are advised that any disclosure, copying, distribution, or the taking of any action in reliance upon the communication is strictly prohibited. Moreover, any such inadvertent disclosure shall not compromise or be a waiver of any applicable privilege as to this communication or otherwise. If you have received this communication in error, please contact the sender at its Internet address above, or by telephone at (916) 419-7111. Thank you.

From: Middleton, Brandon (ENRD) </O=USDOJ/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=MIDDLETON, BRANDON5EB>
To: Tawnda Elling
CC: Reed Hopper; Damien M. Schiff
Sent: 3/21/2017 1:14:06 PM
Subject: RE: Polar bear

Thanks Tawnda.

From: Tawnda Elling [mailto:tae@pacificlegal.org]

Sent: Tuesday, March 21, 2017 11:57 AM

To: Middleton, Brandon (ENRD) <BMiddleton@ENRD.USDOJ.GOV>

Cc: Reed Hopper <RHopper@pacificlegal.org>; Damien M. Schiff <dms@pacificlegal.org>

Subject: RE: Polar bear

Brandon, I don't think you were on any of the polar bear case(s). There was a reference in an internal email

Ex. 4

60-day notice letter only has Reed & Damien's names on the signature block.

From: Middleton, Brandon (ENRD) [mailto:Brandon.Middleton@usdoj.gov]

Sent: Tuesday, March 21, 2017 8:29 AM

To: Tawnda Elling <tae@pacificlegal.org>

Cc: Reed Hopper <RHopper@pacificlegal.org>; Damien M. Schiff <dms@pacificlegal.org>

Subject: Polar bear

Hi Tawnda,

Would someone at PLF be able to review my PLF work history on the polar bear issue? I seem to recall

Ex. 4

Ex. 4

I am trying to figure out my recusal obligations on any current

polar bear matters.

Thank you.

Brandon

CONFIDENTIALITY NOTICE: This communication and any accompanying document(s) are confidential and privileged. They are intended for the sole use of the addressee. If you receive this transmission in error, you are advised that any disclosure, copying, distribution, or the taking of any action in reliance upon the communication is strictly prohibited. Moreover, any such inadvertent disclosure shall not compromise or be a waiver of any applicable privilege as to this communication or otherwise. If you have received this communication in error, please contact the sender at its Internet address above, or by telephone at (916) 419-7111. Thank you.

From: Reed Hopper <RHopper@pacificlegal.org>
To: Middleton, Brandon (ENRD)
Sent: 3/21/2017 12:19:45 PM
Subject: E.O.

Brandon, I just wanted to make you aware that I have signed a contract to publish a law review article this fall entitled *Running Down the Controlling Opinion in Rapanos v. United States*. It lends support to the president's executive order on WOTUS. Here is the abstract:

In *Rapanos v United States*, a majority on the Supreme Court held the federal government could not regulate all "waters of the United States" under the Clean Water Act based on a mere hydrological connection to a traditional navigable waterway. But the Court split 4-1-4 as to the jurisdictional test for covered waters. The four-member Scalia plurality would authorize federal regulation of only those wetlands physically abutting and indistinguishable from natural rivers, lakes, and streams connected to a traditional navigable waterway. Justice Kennedy concurred in the judgment but proffered a different test that would allow federal regulation of any wetland with a "significant nexus" to a traditional navigable water, even in the absence of a direct hydrological connection. The four Justices in the dissent would authorize federal regulation of all waters that would serve to protect the nation's waters generally. Therefore, the lower courts must decide the controlling opinion. The only standard provided by the Supreme Court to interpret its split decisions is set forth in *Marks v. United States*. Under *Marks*, the controlling opinion is that position "taken by those Members who concurred in the judgments on the narrowest grounds." The term "narrowest grounds" means that opinion which is a logical subset of the other concurring opinion(s) in the case. The circuit courts are divided on how to apply *Marks* to the *Rapanos* decision. Some have adopted the lone Kennedy concurrence or rejected *Marks* as unworkable allowing the government to establish federal jurisdiction under either the Kennedy concurrence or the Scalia plurality. In each case, the court either misconstrued *Marks* or misinterpreted *Rapanos*. This article makes the case that whenever the Scalia plurality would find a jurisdictional water, Justice Kennedy would agree because the plurality test is a logical subset of Justice Kennedy's broader "significant nexus" test. Together, the four Justices in the plurality and Justice Kennedy constitute a five-member majority. Under a proper application of *Marks*, the Scalia plurality is the controlling opinion in the *Rapanos* decision.

Reed

CONFIDENTIALITY NOTICE: This communication and any accompanying document(s) are confidential and privileged. They are intended for the sole use of the addressee. If you receive this transmission in error, you are advised that any disclosure, copying, distribution, or the taking of any action in reliance upon the communication is strictly prohibited. Moreover, any such inadvertent disclosure shall not compromise or be a waiver of any applicable privilege as to this communication or otherwise. If you have received this communication in error, please contact the sender at its Internet address above, or by telephone at (425) 576-0484. Thank you.

From: Middleton, Brandon (ENRD) </O=USDOJ/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=MIDDLETON, BRANDON5EB>
To: Tawnda Elling
Sent: 3/21/2017 11:33:25 AM
Subject: RE: Polar bear

Thank you. Have not heard from MRH or DMS yet.

From: Tawnda Elling [mailto:tae@pacificlegal.org]
Sent: Tuesday, March 21, 2017 11:32 AM
To: Middleton, Brandon (ENRD) <BMiddleton@ENRD.USDOJ.GOV>
Subject: RE: Polar bear

Let me know if you've heard back from either Damien or Reed. Damien is on vacation this week, but he may answer your email. I can do a search in LaserFiche and see what turns up

From: Middleton, Brandon (ENRD) [mailto:Brandon.Middleton@usdoj.gov]
Sent: Tuesday, March 21, 2017 8:29 AM
To: Tawnda Elling <tae@pacificlegal.org>
Cc: Reed Hopper <RHopper@pacificlegal.org>; Damien M. Schiff <dms@pacificlegal.org>
Subject: Polar bear

Hi Tawnda,

Would someone at PLF be able to review my PLF work history on the polar bear issue?

Ex. 4

Ex. 4

Ex. 4 I am trying to figure out my recusal obligations on any current polar bear matters.

Thank you.

Brandon

CONFIDENTIALITY NOTICE: This communication and any accompanying document(s) are confidential and privileged. They are intended for the sole use of the addressee. If you receive this transmission in error, you are advised that any disclosure, copying, distribution, or the taking of any action in reliance upon the communication is strictly prohibited. Moreover, any such inadvertent disclosure shall not compromise or be a waiver of any applicable privilege as to this communication or otherwise. If you have received this communication in error, please contact the sender at its Internet address above, or by telephone at (916) 419-7111. Thank you.

From: Wood, Allison D. <awood@hunton.com>
To: Middleton, Brandon (ENRD)
CC: Brownell, Bill
Sent: 2/24/2017 5:10:03 AM
Subject: Draft Motion To Sever
Attachments: Final Motion to Sever UARG and LG&E and KU Petitions_64014881_1-c.DOCX

Dear Brandon,

Attached for your review is a draft of the motion to sever that the Utility Air Regulatory Group, American Public Power Association, and LG&E and KU Energy plan to file later today. I would appreciate your keeping the draft confidential and limiting its distribution only to those persons necessary. Please let Bill or me know if you have any questions on the draft motion.

Best regards,

Allison



Allison D. Wood
Partner
awood@hunton.com
p202.955.1945
[bio](#) | [vCard](#)

Hunton & Williams LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
hunton.com